

## SENATE BILL NO. 450

INTRODUCED BY D. GRIMES

A BILL FOR AN ACT ENTITLED: "AN ACT EXCLUDING SERVICES PERFORMED BY ~~SECURITIES AND~~ INSURANCE SALESPeOPLE WHO ARE PAID SOLELY BY COMMISSION AND HAVE NO GUARANTEE OF MINIMUM EARNINGS FROM THE DEFINITION OF "EMPLOYMENT" FOR PURPOSES OF UNEMPLOYMENT AND WORKERS' COMPENSATION INSURANCE LAWS; AMENDING SECTIONS 39-51-204 AND 39-71-401, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-51-204, MCA, is amended to read:

**"39-51-204. Exclusions from definition of employment.** (1) The term "employment" does not include:

(a) domestic or household service in a private home, local college club, or local chapter of a college fraternity or sorority, except as provided in 39-51-202(3). If an employer is otherwise subject to this chapter and has domestic or household service employment, all employees engaged in domestic or household service must be excluded from coverage under this chapter if the employer:

(i) does not meet the monetary payment test in any quarter or calendar year, as applicable, for the subject wages attributable to domestic or household service; and

(ii) keeps separate books and records to account for the employment of persons in domestic or household service.

(b) service performed by a dependent member of a sole proprietor for whom an exemption may be claimed under 26 U.S.C. 152 or service performed by a sole proprietor's spouse for whom an exemption based on marital status may be claimed by the sole proprietor under 26 U.S.C. 7703;

(c) service performed as a freelance correspondent or newspaper carrier if the person performing the service, or a parent or guardian of the person performing the service in the case of a minor, has acknowledged in writing that the person performing the service and the service are not covered. As used in this subsection:

(i) "freelance correspondent" is a person who submits articles or photographs for publication and

1 is paid by the article or by the photograph; and

2 (ii) "newspaper carrier" means a person who provides a newspaper with the service of delivering  
3 newspapers singly or in bundles. The term does not include an employee of the paper who, incidentally  
4 to the employee's main duties, carries or delivers papers.

5 (d) ~~service services performed as a by QUALIFIED real estate broker or salesperson who is licensed~~  
6 ~~pursuant to Title 37, chapter 51, securities, AGENTS, AS DEFINED IN 26 U.S.C. 3508, or insurance salespeople~~  
7 ~~paid solely by commission and without a guarantee of minimum earnings;~~

8 (e) service performed by a cosmetologist who is licensed under Title 37, chapter 31, or a barber  
9 who is licensed under Title 37, chapter 30, and:

10 (i) who has acknowledged in writing that the cosmetologist or barber is not covered by  
11 unemployment insurance and workers' compensation;

12 (ii) who contracts with a cosmetology salon, as defined in 37-31-101, or a barbershop, as defined  
13 in 37-30-101, which contract must show that the cosmetologist or barber:

14 (A) is free from all control and direction of the owner in the contract;

15 (B) receives payment for service from individual clientele; and

16 (C) leases, rents, or furnishes all of the cosmetologist's or barber's own equipment, skills, or  
17 knowledge; and

18 (iii) whose contract gives rise to an action for breach of contract in the event of contract  
19 termination. The existence of a single license for the cosmetology salon or barbershop may not be  
20 construed as a lack of freedom from control or direction under this subsection.

21 (f) casual labor not in the course of an employer's trade or business performed in any calendar  
22 quarter, unless the cash remuneration paid for the service is \$50 or more and the service is performed by  
23 an individual who is regularly employed by the employer to perform the service. "Regularly employed"  
24 means that the service is performed during at least 24 days in the same quarter.

25 (g) service performed by sole proprietors, working members of a partnership, members of a  
26 member-managed limited liability company that has filed with the secretary of state, or partners in a limited  
27 liability partnership that has filed with the secretary of state;

28 (h) service performed for the installation of floor coverings if the installer:

29 (i) bids or negotiates a contract price based upon work performed by the yard or by the job;

30 (ii) is paid upon completion of an agreed-upon portion of the job or after the job is completed;

1 (iii) may perform service for anyone without limitation;

2 (iv) may accept or reject any job;

3 (v) furnishes substantially all tools and equipment necessary to provide the service; and

4 (vi) works under a written contract that:

5 (A) gives rise to a breach of contract action if the installer or any other party fails to perform the  
6 contract obligations;

7 (B) states that the installer is not covered by unemployment insurance; and

8 (C) requires the installer to provide a current workers' compensation policy or to obtain an  
9 exemption from workers' compensation requirements;

10 (i) service performed as a direct seller as defined by 26 U.S.C. 3508;

11 (j) service performed by a petroleum land professional. As used in this subsection, "petroleum land  
12 professional" means a person who:

13 (i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in  
14 negotiating a business agreement for the exploration or development of minerals;

15 (ii) is paid for service that is directly related to the completion of a contracted specific task rather  
16 than on an hourly wage basis; and

17 (iii) performs all services as an independent contractor pursuant to a written contract.

18 (k) service performed by an ordained, commissioned, or licensed minister of a church in the  
19 exercise of the church's ministry or by a member of a religious order in the exercise of duties required by  
20 the order;

21 (l) service performed by an individual receiving rehabilitation or remunerative work in a facility  
22 conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning  
23 capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for  
24 individuals who, because of impaired physical or mental capacity, cannot be readily absorbed in the  
25 competitive labor market;

26 (m) service performed as part of an unemployment work-relief or work-training program assisted  
27 or financed in whole or in part by a federal agency or any agency of a state or political subdivision of the  
28 state by an individual receiving work relief or work training;

29 (n) service performed for a state prison or other state correctional or custodial institution by an  
30 inmate of that institution;

(o) service performed by an individual who is sentenced to perform court-ordered community service or similar work;

(p) service performed by elected public officials;

(q) agricultural labor, except as provided in 39-51-202(2), (4), or (6). If an employer is otherwise subject to this chapter and has agricultural employment, all employees engaged in agricultural labor must be excluded from coverage under this chapter if the employer:

(i) in any quarter or calendar year, as applicable, does not meet either of the tests relating to the monetary amount or number of employees and days worked for the subject wages attributable to agricultural labor; and

(ii) keeps separate books and records to account for the employment of persons in agricultural labor.

(r) service performed in the employ of any other state or its political subdivisions or of the United States government or of an instrumentality of any other state or states or their political subdivisions or of the United States, except that national banks organized under the national banking law are not entitled to exemption under this subsection and are subject to this chapter the same as state banks, if the service is excluded from employment as defined in section 3306(c)(7) of the Federal Unemployment Tax Act;

(s) service in which unemployment insurance is payable under an unemployment insurance system established by an act of congress if the department enters into agreements with the proper agencies under an act of congress and those agreements become effective in the manner prescribed in the Montana Administrative Procedure Act for the adoption of rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment insurance under an act of congress or who have, after acquiring potential rights to unemployment insurance under the act of congress, acquired rights to benefits under this chapter;

(t) service performed in the employ of a school or university if the service is performed by a student who is enrolled and is regularly attending classes at a school or university or by the spouse of a student if the spouse is advised, at the time that the spouse commences to perform the service, that the employment of the spouse to perform the service is provided under a program to provide financial assistance to the student by the school or university and that the employment is not covered by any program of unemployment insurance;

(u) service performed by an individual who is enrolled at a nonprofit or public educational

1 institution that normally maintains a regular faculty and curriculum and normally has a regularly organized  
2 body of students in attendance at the place where its educational activities are carried on, as a student  
3 in a full-time program taken for credit at an institution that combines academic instruction with work  
4 experience if the service is an integral part of the program and the institution has certified that fact to the  
5 employer, except that this subsection (1)(u) does not apply to service performed in a program established  
6 for or on behalf of an employer or group of employers;

7 (v) service performed as an officer or member of the crew of a vessel on the navigable waters of  
8 the United States; or

9 (w) service performed by an alien admitted to the United States to perform agricultural labor  
10 pursuant to sections 214(c) and 1101(a)(H)(ii)(a) of the Immigration and Nationality Act.

11 (2) An individual found to be an independent contractor by the department under the terms of  
12 39-71-401(3) is considered an independent contractor for the purposes of this chapter. An independent  
13 contractor is not precluded from filing a claim for benefits and receiving a determination pursuant to  
14 39-51-2402.

15 (3) This section does not apply to a state or local governmental entity or a nonprofit organization  
16 defined under section 501(c)(3) of the Internal Revenue Code unless the service is excluded from  
17 employment as defined in the Federal Unemployment Tax Act."

18  
19 **Section 2.** Section 39-71-401, MCA, is amended to read:

20 **"39-71-401. Employments covered and employments exempted.** (1) Except as provided in  
21 subsection (2), the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to  
22 all employees, as defined in 39-71-118. An employer who has any employee in service under any  
23 appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the  
24 provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers'  
25 Compensation Act is subject to and bound by the compensation plan that has been elected by the  
26 employer.

27 (2) Unless the employer elects coverage for these employments under this chapter and an insurer  
28 allows an election, the Workers' Compensation Act does not apply to any of the following employments:

- 29 (a) household and domestic employment;  
30 (b) casual employment as defined in 39-71-116;

(c) employment of a dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code;

(d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3);

(e) employment of a ~~broker or salesperson performing under a license issued by the board of realty regulation~~ real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings;

(f) employment as a direct seller as defined by 26 U.S.C. 3508;

(g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States;

(h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105;

(i) employment with a railroad engaged in interstate commerce, except that railroad construction work is included in and subject to the provisions of this chapter;

(j) employment as an official, including a timer, referee, or judge, at a school amateur athletic event, unless the person is otherwise employed by a school district;

(k) employment of a person performing services as a newspaper carrier or freelance correspondent if the person performing the services or a parent or guardian of the person performing the services in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered. As used in this subsection, "freelance correspondent" is a person who submits articles or photographs for publication and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier":

(i) is a person who provides a newspaper with the service of delivering newspapers singly or in bundles; but

(ii) does not include an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers.

(l) cosmetologist's services and barber's services as defined in 39-51-204(1)(e);

(m) a person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose

1 business is conducted solely within the exterior boundaries of an Indian reservation;

2 (n) employment of a jockey who is performing under a license issued by the board of horseracing  
3 from the time that the jockey reports to the scale room prior to a race through the time that the jockey  
4 is weighed out after a race if the jockey has acknowledged in writing, as a condition of licensing by the  
5 board of horseracing, that the jockey is not covered under the Workers' Compensation Act while  
6 performing services as a jockey;

7 (o) employment of an employer's spouse for whom an exemption based on marital status may be  
8 claimed by the employer under 26 U.S.C. 7703;

9 (p) a person who performs services as a petroleum land professional. As used in this subsection,  
10 a "petroleum land professional" is a person who:

11 (i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in  
12 negotiating a business agreement for the exploration or development of minerals;

13 (ii) is paid for services that are directly related to the completion of a contracted specific task rather  
14 than on an hourly wage basis; and

15 (iii) performs all services as an independent contractor pursuant to a written contract.

16 (q) an officer of a quasi-public or a private corporation or manager of a manager-managed limited  
17 liability company who qualifies under one or more of the following provisions:

18 (i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or  
19 the limited liability company and does not receive any pay from the corporation or the limited liability  
20 company for performance of the duties;

21 (ii) the officer or manager is engaged primarily in household employment for the corporation or the  
22 limited liability company;

23 (iii) the officer or manager either:

24 (A) owns 20% or more of the number of shares of stock in the corporation or owns 20% or more  
25 of the limited liability company; or

26 (B) owns less than 20% of the number of shares of stock in the corporation or limited liability  
27 company if the officer's or manager's shares when aggregated with the shares owned by a person or  
28 persons listed in subsection (2)(q)(iv) total 20% or more of the number of shares in the corporation or  
29 limited liability company; or

30 (iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law,

1 daughter-in-law, nephew, niece, brother, or sister of a corporate officer who meets the requirements of  
2 subsection (2)(q)(iii)(A) or (2)(q)(iii)(B).

3 (r) a person who is an officer or a manager of a ditch company as defined in 27-1-731;

4 (s) service performed by an ordained, commissioned, or licensed minister of a church in the  
5 exercise of the church's ministry or by a member of a religious order in the exercise of duties required by  
6 the order.

7 (3) (a) A sole proprietor, a working member of a partnership, a working member of a limited  
8 liability partnership, or a working member of a member-managed limited liability company who represents  
9 to the public that the person is an independent contractor shall elect to be bound personally and  
10 individually by the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an  
11 exemption from the Workers' Compensation Act.

12 (b) The application must be made in accordance with the rules adopted by the department. There  
13 is a \$25 fee for the initial application. Any subsequent application renewal must be accompanied by a \$25  
14 application fee. The application fee must be deposited in the administration fund established in 39-71-201  
15 to offset the costs of administering the program.

16 (c) When an application is approved by the department, it is conclusive as to the status of an  
17 independent contractor and precludes the applicant from obtaining benefits under this chapter.

18 (d) The exemption, if approved, remains in effect for 3 years following the date of the  
19 department's approval. To maintain the independent contractor status, an independent contractor shall  
20 every 3 years submit a renewal application. A renewal application must be submitted for all independent  
21 contractor exemptions approved on or after July 1, 1995. The renewal application and the \$25 renewal  
22 application fee must be received by the department at least 30 days before the anniversary date of the  
23 previously approved exemption.

24 (e) A person who makes a false statement or misrepresentation concerning that person's status  
25 as an exempt independent contractor is subject to a civil penalty of \$1,000. The department may impose  
26 the penalty for each false statement or misrepresentation. The penalty must be paid to the uninsured  
27 employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.

28 (f) If the department denies the application for exemption, the applicant may, after mediation  
29 pursuant to department rules, contest the denial by petitioning the workers' compensation court.

30 (4) (a) A corporation or a manager-managed limited liability company shall provide coverage for



its employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private corporation, or a manager-managed limited liability company may elect coverage for its corporate officers or managers, who are otherwise exempt under subsection (2), by giving a written notice in the following manner:

(i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by delivering the notice to the board of directors of the corporation or to the management organization of the manager-managed limited liability company; or

(ii) if the employer has elected to be bound by the provisions of compensation plan No. 2 or 3, by delivering the notice to the board of directors of the corporation or to the management organization of the manager-managed limited liability company and to the insurer.

(b) If the employer changes plans or insurers, the employer's previous election is not effective and the employer shall again serve notice to its insurer and to its board of directors or the management organization of the manager-managed limited liability company if the employer elects to be bound.

(5) The appointment or election of an employee as an officer of a corporation, a partner in a partnership, a partner in a limited liability partnership, or a member in or a manager of a limited liability company for the purpose of exempting the employee from coverage under this chapter does not entitle the officer, partner, member, or manager to exemption from coverage.

(6) Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of workers' compensation insurance. A workplace is any location where an employee performs any work-related act in the course of employment, regardless of whether the location is temporary or permanent, and includes the place of business or property of a third person while the employer has access to or control over the place of business or property for the purpose of carrying on the employer's usual trade, business, or occupation. The sign must be provided by the department, distributed through insurers or directly by the department, and posted by employers in accordance with rules adopted by the department. An employer who purposely or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."

**NEW SECTION. Section 3. Effective date.** [This act] is effective on passage and approval.

- END -